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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 719

THE COLORADO NATIONAL BANK OF DENVER,
Appellant,

vs.

HOMER F. BEDFORD, AS TREASURER OF THE STATE OF COLORADO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF COLORADO.

STATEMENT OPPOSING JURISDICTION.

BYRON G. ROGERS,
Attorney General of Colorado,
GEORGE K. THOMAS,
Assistant Attorney General of Colorado,
Counsel for Appellee.

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THE COLORADO NATIONAL BANK OF DENVER,
A NATIONAL BANKING ASSOCIATION,
Appellant,

vs.

HOMER F. BEDFORD, AS TREASURER OF THE STATE OF COLORADO,
Appellee.

STATEMENT AGAINST THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES TO REVIEW ON APPEAL.

Now comes the appellee above named, and contravening the statement as to the jurisdiction of the Supreme Court to review on appeal filed herein by appellant, contends that the Supreme Court of the United States has no jurisdiction upon appeal to review the judgment, decree and decision

in question, and the matters pertinent thereto are as follows:

I.

Appellant has failed to comply with Rule 12 of the Rules of the Supreme Court of the United States, and the question as to whether the Federal courts have jurisdiction has been passed upon by a Federal court.

Rule 12 of the Rules of the Supreme Court of the United States requires that if the appeal is from a State court, the statement of the appellant shall "specify the stage in the proceedings in the court of first instance, and in the appellate court at which and the manner in which the Federal questions sought to be reviewed were raised." This cause, while bearing the Colorado Supreme Court number 14684, is a continuation to final determination by the Supreme Court of the State of Colorado of that cause heretofore determined in the Supreme Court of the State of Colorado bearing docket number 14405, to which appellant refers in its statement of jurisdiction, and portions of which record have been ordered certified to the Supreme Court in the praecipe filed by appellant. Appellant's statement and praecipe, however, omit that portion of the record and proceedings had in said cause number 14405 in connection with removal proceedings from the District Court of the City and County of Denver, State of Colorado to the United States District Court in and for the District of Colorado, and omit reference to or inclusion of the petition for removal to the Federal court filed by appellant in the State court, the order of the State court removing the same, and the subsequent order of the Federal court remanding said cause from the United States District Court for the District of Colorado to the District Court of the City and County of Denver, State of Colorado, where the same originated. In omitting from its statement these portions

of the record and failing to set forth in its statement this stage in the proceedings in the court of first instance in which and the manner in which the Federal questions sought to be reviewed were raised, appellant has failed to comply with the requirements of Rule 12 aforesaid.

II.

A Federal court having passed upon the Federal question adversely to appellant, the same is res adjudicata, and having failed to appeal from the order of the Federal court appellant has waived right to appeal to the United States Supreme Court.

Appellant filed its petition for removal from the Colorado State courts to the Federal District Court in Colorado, setting forth among its grounds for removal the following (R. 1-8):

> "(1) That this defendant is a National Banking Association, organized and existing under the laws of the United States.
>
> "(2) That this action was brought and is being prosecuted to determine, and the basic question involved is, whether or not the said United States Constitution and Laws, including U. S. C. A. Title 12, Section 548, do not exempt the defendant bank from the said threatened taxation, or whether or not they grant the right or privilege to tax a National Bank in the manner and form specified in the said Service Tax Act."

Said petition sets out at length each and every allegation included in appellant's statement as to jurisdiction filed herein, as well as the "Federal questions" here sought to be reviewed.

The State court, upon said petition, entered its order of removal to the United States District Court in and for the District of Colorado. Upon lodgment in the United States District Court, appellee filed his motion to remand upon

the grounds that no Federal question was involved. This motion was argued before the Honorable J. Foster Symes, Judge of the United States District Court in and for the District of Colorado, who granted the same and entered the following order remanding (R. 11):

> "This cause comes on now to be heard on the motion of the plaintiff, to remand this cause, and is argued by counsel, Elmer P. Cogburn, Esquire, appearing as solicitor for the plaintiff, and Walter W. Blood, Esquire, appearing as solicitor for the defendant, The Colorado National Bank. And thereupon, on consideration thereof;
>
> "It is ordered by the Court that the said motion be, and the same is hereby, granted, and that this cause be, and the same is hereby remanded to the District Court of the Second Judicial District of the State of Colorado, sitting within and for the City and County of Denver, from whence it came there to proceed according to law; and that the clerk of this Court transmit to said district court a certified copy of this order without delay.
>
> "It is further ordered, adjudged, and decreed, that the plaintiff do have and recover of and from the defendants his costs by him in this behalf and in this court laid out and expended, to be taxed, and that execution issue therefor as at law.
>
> A true copy as of record
>
> Teste:
>
> CHARLES W. BISHOP,
> *Clerk,*
>
> By WILLIAM GRAF,
> [SEAL.] *Deputy Clerk."*

The Federal questions sought to be reviewed by appellant had been determined by a Federal court adversely to appellant, and no appeal was taken therefrom. Appellant is bound thereby.

III.

As to the Colorado Statute Drawn in Question.

The validity of the statute of the State of Colorado which appellant seeks to review, is not questioned. On the contrary, appellant seeks to avoid the operation of that statute by invoking the protection of the Federal statute granting permission to states to tax National Banks (U. S. Revised Statutes Sec. 5219 as amended) (U. S. C. A., Title 12, Sec. 548), and the claim made by appellant in this cause that the Colorado statute involved is a tax upon a Federal agency, to-wit: a National bank. The Supreme Court of the State of Colorado in its decision on the facts presented declared:

> First: That the tax imposed by the Colorado Act was a tax, not upon the bank, but upon the user of the bank's depository services, and
>
> Second: That depository facilities are not banking services. (Bedford, Treasurer vs. Colorado National Bank, 104 Colo. 311, 91 Pac. (2d) 469) attached to appellant's statement as to jurisdiction as exhibit "D".

Hence, it is apparent that the court found that the Colorado National Bank, in engaging in the safety deposit box business, is engaging in a business which is not banking, but which is foreign thereto and wholly unnecessary to the rendition of the bank's services as a Federal agent engaged in banking under Federal laws. In other words, when the bank indulges in a business beyond the scope of its banking business, it loses the protection afforded by Federal law to Federal agencies, and falls within the distinction of *Alward* v. *Johnson*, 282 U. S. 509, 51 S. Ct. 273, 75 L. Ed. 496, where the Supreme Court of the United States sustained a state tax upon the gross receipts of an independent contractor carrying the mails. In that case the taxpayer operated an automotive stage line. Two-thirds of

his gross receipts, upon the whole of which he was taxed, were derived from carriage of United States mail, and the remainder from carriage of passengers and freight. The court found that the property used in earning these receipts was devoted chiefly to carrying the mails, and that without his contract with the government the stage line could not be operated profitably.

Referring further to the Colorado taxing statute involved, the distraints, penalties and fines imposed by that statute are in no sense taxes upon the bank or banking business, but are remedies given by the statute for the collection of the tax in the hands of the collector. The Act further provides compensation to the bank for its services in collecting the tax, and also provides that where the person engaged in rendering the taxable services holds a license under the provisions of any statute requiring the issuance or securing of a license, that the state service license is unnecessary. The bank being licensed under Federal laws, as well as state laws, comes within the foregoing exception, and it is unnecessary for the bank to apply for a service tax license or to pay the fee for its issuance. Hence, there is no tax or charge upon the bank itself. (Service Tax Act of 1937 as amended and reenacted, Chapter 158, Session Laws of Colorado 1939.)

> "Section 4. (a) It shall be unlawful for any person to engage in the business of rendering or performing services as the same is defined in this act, after the effective date of this act without first having obtained a license therefor, which license shall be granted and issued by the state treasurer and shall be in force and effect until the thirty-first day of December of the year in which it is issued, unless sooner revoked; *except a person who has obtained and who holds a license issued under the provisions of any statute requiring the issuance or securing of a license* and a person engaged in the business of rendering or performing services of a professional, technical or scientific nature."

IV.

As to the Federal Questions Being Substantial and Their Presentation.

The tax imposed by the Colorado statute having been declared to be a tax upon the user of the services, and there being no tax directly imposed upon the bank, and the bank being engaged in a business wholly foreign and unnecessary to its functions as a National bank, there is no substantial Federal question involved.

In the case of *Gully* v. *First National Bank in Meridian*, 299 U. S. 109, 57 S. Ct. 96, the Supreme Court, in imposing a state obligation for liabilities assumed by the defendant bank for monies owed the state collector of taxes for state, county and school district taxes in the form of an assessment imposed upon shares of capital stock of the bank, declared:

> "Not every question of Federal law emerging in a suit, is proof that a Federal law is the basis of the suit. The tax here in controversy, if valid as a tax at all, was imposed under the authority of a statute of Mississippi. The Federal law did not attempt to impose it or to confer upon the tax collector authority to sue for it. True, the tax, though assessed through the action of the state, must be consistent with the Federal statute consenting, subject to restrictions that such assessments may be made. (Citations.) It must also be consistent with the Constitution of the United States. (Citations.) If there were no Federal law permitting the taxation of shares in National banks, a suit to recover such a tax would not be one arising under the Constitution of the United States, though the bank would have the aid of the Constitution when it came to its defense. (Citations.) That there is a Federal law permitting such taxation, does not change the basis of the suit, which is still the statute of the state, though the Federal law is evidence to prove the statute

valid. • • • Here the right to be established is one created by the state. It is unimportant that Federal consent is the source of state authority. To reach the underlying law we do not travel back so far. By unimpeachable authority a suit brought upon a state statute does not arise under an Act of Congress or the Constitution of the United States because prohibited thereby."

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